

BEFORE THE  
SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF A  
SHORELINE VARIANCE PERMIT  
ISSUED BY PIERCE COUNTY TO  
DOROTHY GRENLEY,

PETER MADDEN,

Appellant,

v.

DOROTHY GRENLEY, PIERCE COUNTY,  
and STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondents.

SHB No. 80-30

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, the request for review from the issuance of a shoreline variance permit to respondent Dorothy Grenley by Pierce County and its approval by the Department of Ecology, came before the Shorelines Hearings Board, Nat W. Washington, presiding, Gayle Rothrock, Rodney Kerslake, Steven Tilley, and Richard A. O'Neal, Members, in Lacey, Washington, on March 27, 1981.

1 Appellant Peter Madden was represented by his attorney William H.  
2 Griffies and respondent Dorothy Grenley was represented by her  
3 attorney Marshall D. Adams.

4 Having heard or read the testimony, having examined the exhibits,  
5 and having considered the parties' contentions, arguments and briefs,  
6 the Shorelines Hearings Board now makes these

7 FINDINGS OF FACT

8 I

9 Appellant Peter Madden and respondent Dorothy Grenley reside on  
10 contiguous pieces of property fronting on Gravelly Lake, a 200-plus  
11 acre, non-navigable lake in Pierce County, Washington. A series of  
12 disagreements arose between the parties involving trespass on  
13 appellant's property by respondent's dog and trespass on respondent's  
14 property by appellant's young daughter, which culminated in a court  
15 action charging respondent's husband with harboring a dangerous dog.  
16 The court action was resolved in favor of respondent's husband.  
17 Thereafter, respondent and her husband built a six-foot high chain  
18 link fence from the street side of their property along what they  
19 believed to be their southerly property line to a bulkhead which marks  
20 the line of ordinary high water, a distance of about 360 feet. The  
21 fence continued waterward from the bulkhead for a distance of about 15  
22 feet to about the line of mean low water.

23 During low water the fence was entirely on dry land, but during  
24 high water all of the fence waterward from the lower bulkhead extended  
25 into the water.

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER

There are two bulkheads on respondent's property. One which is approximately 2-1/2 feet high is located on the shoreline and establishes the line of ordinary high water. A second bulkhead is located up the slope, approximately 6 to 8 feet landward of the first.

## II

Appellant and his wife brought an action in Superior Court against respondent and her husband claiming that the fence encroached upon their property. The court in establishing the common boundary found that the major portion of the fence did not encroach on appellant's property. It was determined, however, that the short stretch extending waterward from the lower bulkhead was on appellant's property. Respondent and her husband removed this section of the fence. They were informed by the Pierce County Planning Department that before reconstructing the waterward section of the fence on their own property, they would need a variance. On April 22, 1980, respondent Dorothy Grenley applied for a variance to construct a six-foot chain link fence which would extend 15 feet waterward from the bulkhead.

A substantial development permit with a variance (Exhibit A-12) was granted by the hearing examiner for the county on July 9, 1980, with the following conditions:

1. The fence shall not be constructed upon the property of the adjacent property owners.
2. Construction should be undertaken in such a manner as to cause little disruption of the lake as possible.

1 3. The fence shall be hinged like a gate so that the extremity  
2 can be moved northerly to the Grenley property as the water level  
3 rises and southerly as the water level recedes so that at all  
4 times the effective barrier of the fence shall repose on dry  
5 ground.

6 The permit cites PCSMP 65.62.020, 65.62.030(A)2&5 and 65.62.050(C)  
7 as being the residential development regulations of the master program  
8 applicable to respondent's proposed fencing development.

9 The examiner's decision was appealed to the Board of Commissioners  
10 of Pierce County which upheld the decision. The substantial  
11 development/variance permit as granted was approved by the Department  
12 of Ecology (DOE).

### 13 III

14 At the present time there are only two fences on Gravelly Lake  
15 which extend waterward of the line of ordinary high water, and neither  
16 were constructed under any kind of a shoreline permit. Should the  
17 fence proposed by the respondent be approved, the precedent might well  
18 encourage further requests for similar fences. The cumulative impact  
19 of other such fences would adversely affect the aesthetic quality of  
20 the shoreline of the lake and would lessen the public opportunity to  
21 enjoy the physical and aesthetic qualities of Gravelly Lake and its  
22 natural shorelines. The waters of Gravelly Lake are waters of the  
23 state and are open to boating and other recreational uses of the  
24 public even though most of the shoreline is privately owned and is not  
25 open to the public.

1 IV

2 The primary and real purpose of the proposed fence is to prevent  
3 appellant's family and the public generally from trespassing on the  
4 property of respondent and her husband. Since it is built only along  
5 the southerly boundary of respondent's property next to the property  
6 of appellant, it is questionable whether the fence, if built, will  
7 accomplish its intended purpose.

8 V

9 Any Conclusion of Law which should be deemed a Finding of Fact is  
10 hereby adopted as such.

11 From these Findings, the Shorelines Hearings Board comes to these

12 CONCLUSIONS OF LAW

13 I

14 There were disputes over peripheral factual issues, but there was  
15 no serious dispute regarding the material factual issues. The  
16 determination of this matter, therefore, rests primarily on resolving  
17 the following two issues which largely involve matters of law. These  
18 issues are:

- 19 1. Is a variance required for a fence under the provisions of the  
20 Pierce County Shoreline Master Program (hereinafter PCSMP)?  
21 2. If a variance is required for a fence, does respondent's fence  
22 meet the variance requirements of WAC 173-14-150(3)(b)?

23 II

24 We conclude that the hearings examiner for the county was correct  
25 in determining that a variance is required for respondent's fencing  
26 project.

1 A variance is required for the construction of residential  
2 structures waterward of the extreme high water mark under the  
3 provisions of PCSMP, Section 65.62.030(A)(5), cited by the examiner,  
4 which provides:

5 A. Prior to the approval of any residential  
6 development and associated roads and utilities  
7 pursuant to this Chapter, the appropriate  
8 reviewing authority shall be satisfied that:  
(emphasis added)

9 . . . . .

10 5. All residential structures shall be landward  
11 of the extreme high water mark. (emphasis added)

### 12 III

13 A fence is a structure within the purview of PCSMP sections  
14 65.62.010<sup>1</sup> and 65.62.030(A)(5). Websters Third International  
15 Dictionary defines "structure" very broadly as "something constructed  
16 or built." A fence is certainly something that is constructed or  
17 built.  
18

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19 1. 65.62.010 DEFINITION. Residential development shall mean one or  
20 more buildings or structures or portions thereof which are designed  
21 for and used to provide a place of abode for human beings, including  
22 one or two family detached dwellings, multifamily residences, row  
23 houses, townhouses, mobile home parks and other similar group housing,  
24 together with accessory uses and structures normally common to  
residential uses including but not limited to garages, sheds, boat  
storage facilities, tennis courts, and swimming pools. Residential  
development shall not include hotels, motels, or any other type of  
overnight or transient housing or camping facilities. (Emphasis  
added.)

1 The term residential structure itself is not specifically defined  
2 in the master program, but PCSMP 65.62.010 which defines residential  
3 development makes it clear that residential development includes not  
4 only the place of abode but also the structures normally common to  
5 residential uses. A structure common to a residential use is a  
6 residential structure. Since a fence is a structure normally common  
7 to residential use, it comes within the meaning of the term  
8 "residential structure" as used in PCSMP section 65.62.030(A)(5).

9 IV

10 The fence in question is a development as defined by RCW  
11 90.58.030(3)(d) which provides:

12 (d) "Development" means use consisting of the  
13 construction or exterior alteration of structures:  
14 dredging; drilling; dumping; filling; removal of any  
15 sand, gravel or minerals; bulkheading; driving of  
16 piling; placing of obstructions; or any project of a  
17 permanent or temporary nature which interferes with  
18 the normal public use of the surface of the waters  
19 overlying lands subject to this chapter at any state  
20 of water level. (Emphasis added.)

21 Fencing is a use consisting of the construction of a structure.  
22 It is also an obstruction.

23 RCW 90.58.140(1) provides that no development shall be undertaken  
24 on the shorelines of the state except those that are consistent with  
25 the policy of chapter 90.58 RCW and the applicable Master Program.

26 RCW 90.58.100(5) makes provisions for variances under some  
27 circumstance to allow the construction of developments which would  
otherwise be precluded by the Master Program.

V

Respondent Grenley contends strongly that a variance is necessary only if the fence is a substantial development. This contention is without merit. Attorney General v. Grays Harbor County, SHB 232 (6/10/77).

It should be noted that WAC 173-14-150(3) refers broadly to "development" and does not restrict its applicability to "substantial development."

PCSMP section 65.62.020 provides that structures having a fair market value of less than \$1000, although exempt from the provisions requiring a substantial development permit, must, nevertheless, comply with the prohibition regulations and standards of chapter 65.62.

VI

Since the proposed fencing project which will extend waterward from the ordinary high water mark is both a residential development and a residential structure, its construction will violate Section PCSMP 65.62.030(A)(5) which provides that all residential structures shall be landward of the extreme high water. The extreme high water mark is landward of the ordinary high water mark so a residential structure extending waterward from the ordinary high water is in violation of the provision. Therefore, it can only be constructed if a variance is granted.

VII

Since we have concluded that respondent's fencing project violates the provisions of PCSMP 65.62.030(A)(5), and therefore requires a variance, it is not necessary that we determine whether the fence was



1 also in violation of PCSMP 65.62.050(C) which requires building  
2 structures to be set back 50 feet from the ordinary high water line or  
3 lawfully constructed bulkhead.

#### 4 VIII

5 Having determined that it was necessary for respondent Grenley to  
6 secure a variance in order to construct the proposed fence, it is  
7 necessary to determine whether or not the variance granted by the  
8 County and approved by DOE meets the variance requirements set forth  
9 both in WAC 173-14-150(3) and PCSMP Section 65.72.020. We hold that  
10 it does not.

#### 11 IX

12 WAC 173-14-150(3), which deals with variances for developments  
13 waterward of the ordinary high water mark, sets forth five standards.  
14 A development, in order to be eligible for a variance, must meet each  
15 of the five enumerated standards.

16 Respondent Grenley's proposed fencing development located  
17 waterward of the bulkhead does not meet the test of standard number  
18 (a) which provides:

19 (a) That the strict application of the bulk,  
20 dimensional or performance standards set forth in the  
21 applicable master program precludes a reasonable  
permitted use of the property.

22 The strict requirement that a variance will only be granted if the  
23 master program standards actually precludes a reasonable permitted use  
24 makes it extremely difficult to secure a variance of the bulk or  
25 dimensional requirements of a master program when a waterward

1 development under subsection (3) is involved. It is much easier to  
2 secure a variance for a landward development under subsection (2)  
3 because the applicant need only show that the standards of the master  
4 program will significantly interfere with a reasonable use of the  
5 property.

6 The hardship claimed by respondent and her husband is that without  
7 the fence, appellants and others will trespass on their property.  
8 This hardship may interfere with the peace of mind of respondent and  
9 her husband, and, thus, interfere somewhat with their use of their  
10 property, but it does not follow that preclusion from building the  
11 fence will preclude a reasonable use of their property. The same  
12 prospect of trespass faces other residents around the lake. We  
13 conclude that denial of the variance for that portion of the fence  
14 waterward of the bulkhead will not preclude respondent and her husband  
15 of a reasonable use of their waterfront residential property.

16 X

17 Respondents fence project does not meet the test of variance  
18 requirement (b) which provides:

19 (b) That the hardship described in  
20 WAC 173-14-150(3)(a) above is specifically related to  
21 the property, and is the result of unique conditions  
22 such as irregular lot shape, size, or natural  
features and the application of the master program,  
and not, for example, from deed restrictions or the  
applicant's own actions.

23 The alleged hardship consisting of trespass by appellant's family  
24 and the public is in no way related to, nor is it the result of unique  
25 conditions such as irregular lot shape, size, or natural features.

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER

XI

Respondent's fence project does not meet the test of variance requirement (f) which provides:

(f) That the public will suffer no substantial detrimental effect.

The public interest would suffer a substantial detrimental effect if the variance were to be granted.

The extension of respondent's fence waterward from the line of ordinary highwater would thwart the policies of RCW 90.58.020. With the exception of two existing fences, there was no evidence of structures, other than floats and docks projecting waterward from the line of ordinary high water. Floats and docks serve a practical water oriented purpose, are generally considered to be an acceptable part of a residential waterfront scene and are permitted by PCSMP section 65.56.030.

On the other hand, respondent's proposed fence which will project waterward across the beach will be an intrusion which will have little practical purpose and will be a structure which is foreign to the normal waterfront setting. Its use will not be water related, and it will substantially detract from the beauty of the lake and its shoreline. The cumulative<sup>2</sup> effect of many such fences intruding on

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2. The significance of cumulative effect is set forth in RCW 173-14-150(4) as follows:

(4) In the granting of all variance permits, consideration shall be given to the cumulative impact of additional requests for like actions in the area. For example if variances were granted to other developments in the area where similar circumstances

1 to the beaches of Gravelly Lake during the summer low water  
2 period would seriously compound the adverse effect of respondent's  
3 proposed fence.

4 XII

5 We hold that respondent's fencing project does not meet the  
6 variance requirements of PCSMP 65.72.020(A)(B) & (C) and does not meet  
7 the requirement of the same section which provides that applicant must  
8 show that she does not have any reasonable use of her property if she  
9 must comply with the provisions of the PCSMP.

10 XIII

11 The Shorelines Substantial Development/Variance Permit granted to  
12 appellant Dorothy Grenley does not meet the variance standards of  
13 WAC 173-14-150 or PCSMP 65.72.020, and should be reversed.

14 XIV

15 Any Finding of Fact which should be deemed a Conclusion of Law is  
16 hereby adopted as such.

17 From these Conclusions, the Shorelines Hearings Board enters this  
18  
19  
20

21 2. Cont.

22 exist the total of the variances should also remain  
23 consistent with the policies of RCW 90.58.020 and  
24 should not produce substantial adverse effects to the  
25 shoreline environment.

ORDER

The Shorelines Substantial Development/Variance Permit granted to Dorothy Grenley by Pierce County and approved by the Department of Ecology is reversed.

DONE this 30<sup>th</sup> day of June, 1981.

SHORELINES HEARINGS BOARD


  
NAT W. WASHINGTON, Chairman

Did Not Participate  
DAVID AKANA, Member

  
GAYLE ROTHROCK, Member

  
RODNEY KERSLAKE, Member

  
STEVEN TILLEY, Member

  
RICHARD A. O'NEAL, Member